No. 93-392

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

TROOPER THOMAS GARDNER,

Petitioner,

vs.

RICHARD REED, *individually, as administrator of the decedent's estate of Pamela Jo Reed and as guardian of the estates of Angela Reed and Marilyn Reed;* CHIEF HERMAN A. DAVIDSON; CITY OF MARTINSVILLE; DEPUTY SHERIFF JAMES F. BENDER; CLARK COUNTY, ILLINOIS; DEPUTY SHERIFF JACK RAGSDALE; and JASPER COUNTY, ILLINOIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ARIZONA, FLORIDA, GEORGIA, INDIANA, KANSAS, LOUISIANA, MAINE, MINNESOTA, MONTANA, NEVADA, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WISCONSIN, THE TERRITORY OF AMERICAN SAMOA, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a police officer violates the substantive due process rights of victims of private car accidents if he arrests an allegedly sober driver and abandons the car to a drunk passenger who then drives the car and eventually causes injury?

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INTEREST OF THE AMICI CURIAE

The amici States, Territory, and Commonwealth have an abiding interest in this case, in which the Seventh Circuit employed a notion of "substantive due process" assertedly left intact and sanctioned by the ruling in

DeShaney v. Winnebago County Social Services Department, 489 U.S. 189 (1989), to hold that auto accident victims may prove a claim under the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, by reaching back into the chain of causation to a police officer whom the victims never met, who never had any intent to harm the victims, and whose only allegedly unconstitutional actions consisted of failing to prevent a drunk passenger (Larry Rice) in a stopped car from assuming the wheel after the driver of the car Rice was in, Cathy Irby, was herself arrested.

As the Petitioner amply demonstrates, the Seventh Circuit has fundamentally distorted the holding and principle of this Court's decision in *DeShaney*. The court of appeals, moreover, has done so in a way that conflicts with decisions of other circuits, and which demonstrates the great confusion in the lower federal courts, and in the highest state courts, over the scope of the Fourteenth Amendment and the doctrine of "substantive due process" in particular. The result in the Seventh Circuit is not isolated, and, indeed, the issue presented here is a frequently recurring one, affecting hundreds of thousands if not millions of public officials and employees in the Nation who are possibly subject to the reach of 42 U.S.C. § 1983.

The legal theory underlying the decision of the Seventh Circuit in this case has very disturbing implications for the States and Territories, above and beyond its general errors in expanding the notion of "substantive due process" beyond the limits set by this Court in *DeShaney* and other cases. Many of the amici jurisdictions would undoubtedly reject common law or statutory liability against Trooper Gardner. All of the amici here believe

that the States and Territories should have the option of determining on their own whether to do so. Trooper Gardner, after all, never specifically intended to harm the accident victims in this case. Indeed, he never even met them. There is no allegation that Trooper Gardner told Rice to get behind the wheel, to start the car, and to drive it down Route 130 in Jasper County, Illinois, at a speed in excess of ninety miles an hour. Nor did Trooper Gardner have anything to do with the actions of Jasper County Deputy Sheriff Jack Ragsdale, who allegedly was chasing Rice at that speed in an unmarked police car without sounding a siren, operating adequate flasher lights, or otherwise giving warning to oncoming traffic. It is not alleged that Gardner had ever even met or spoken with Ragsdale, that night, or ever before.

Although the Seventh Circuit wrote that the Reeds "face an insurmountable hurdle on summary judgment," the amici States cannot so easily dismiss either the decision or the result in this case. Permitted to stand, the Seventh Circuit's decision in the case below at best constitutionalizes simple negligence and at worst creates a bizarre form of liability that subsidizes the outrageous conduct of tortfeasors like Larry Rice by allowing victims to sue any government official who had anything to do with an accident in a "but for causation" sense.

Because the decision of the Seventh Circuit in this case sharply departs from this Court's repeated admonition that the Due Process Clause is not a "font of tort law," *see Paul v. Davis*, 424 U.S. 693 (1976), and, what is more, radically displaces the common law of torts that exists in many of the States, making public officials (even holding aside the prospect of awards against them under

the Civil Rights Attorneys Fees Act of 1976 (42 U.S.C. § 1988)) even worse off than they would be under state law, the amici States, Territory, and Commonwealth submit this brief in support of Petitioner, and urge the Court to grant review in this case.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Decision of the Seventh Circuit in this Case Directly Conflicts With this Court's Logic and Reasoning in *DeShaney v. Winnebago County Department of Social Services*, and Constitutes an Unwarranted Expansion of the Doctrine of Substantive Due Process.

1. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S 189 (1989), this Court confronted the issue of "when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights." *Id.* at 194. The facts in *DeShaney* were "undeniably tragic," *id.* at 191, and consisted of accusations by Joshua DeShaney's mother, made known to the Winnebago County Department of Social Services, that Joshua's father had " 'hit the boy' " and that Joshua was a " 'prime candidate for child abuse.' " *Id.* at 192. After once dismissing the allegations after interviewing Joshua's father, the County was notified by an emergency room physician that Joshua's father was suspected of child abuse after Joshua was brought to a local hospital with multiple bruises and abrasions. *Id.* Despite this proof, Joshua was released to his father's custody after a three-day stay in the hospital. *Id.* Joshua

was brought into the hospital again; the County was notified again; the County again saw no basis to remove Joshua from his father's custody. *Id.* A caseworker noted continued violations of the conditions on which Joshua's father was allowed continued custody, but took no action to remove Joshua from the home. *Id.* at 193. The County was even notified by emergency room personnel a third time that Joshua apparently had been the victim of child abuse. *Id.* Despite all of this notice, the County did nothing to take Joshua from his father, who ultimately beat Joshua into a life-threatening coma, leaving Joshua permanently brain damaged and "expected to spend the rest of his life confined to an institution for the profoundly retarded." *Id.* Despite these tragic facts, the Court found that there could be no federal liability against the County under the Constitution and 42 U.S.C. § 1983, mainly because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. "Nor," the Court held, "does history support such an expansive reading of the constitutional text"; the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 195-96. "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. Thus, "the State had no constitutional duty to protect Joshua against his father's violence" and "its failure to do so – though calamitous in hindsight – simply does not constitute a violation of the Due Process Clause." *Id.* at 202. Joshua's right to recover

against Winnebago County thus depended on local law. *Id.* at 203.

2. In this case, the Seventh Circuit perceived a critical distinction between the facts here and those in *DeShaney*, in that the complaint in this case could possibly be read to suggest that, in arresting Cathy Irby, who may have been sober, and not disabling Larry Rice, who, it is alleged, was drunk, Trooper Thomas Gardner made the accident victims in this case "more vulnerable" to the risk that Rice would find the keys to the car, drive drunk, speed recklessly, refuse to stop in response to Jasper County Deputy Sheriff Ragsdale's high-speed pursuit, and then, one must assume unintentionally, crash into the car in which Richard Reed and his family were driving. Like other cases in which the courts of appeals have evaded the reasoning of this Court's precedents on the basis of the truism that all cases are distinguishable unless they are factually identical, the judgment in this case should be swiftly reversed. *See United States v. Stanley*, 483 U.S. 669, 680 (1987).

3. At the outset, there are several critical aspects to the facts in this case that make the recognition of a substantive due process claim significantly more offensive to the precepts of *DeShaney* than the facts in *DeShaney* itself. Unlike the case in *DeShaney*, where the defendant had been repeatedly and unquestionably placed on notice that a specific victim – a totally defenseless child – was in the gravest danger from a very specific individual, here, even viewed through the prism of a Rule 12 motion, Trooper Gardner would have to be charged, as a federal matter, with an enormously higher duty than was sought to be imposed in *DeShaney*. Not only would Trooper Gardner have to be expert in the

general physiological effect of alcohol on Larry Rice, he would have to know Rice's probable response to (1) being left in the car with the keys (located someplace in the car); (2) the effects of two hours of driving (with arguable intervening drinking in between) on Rice's ability to control the car; (3) the intervening presence of Deputy Sheriff Ragsdale's high speed chase; and (4) the likelihood that all of the foregoing risks would coalesce and cause the accident here. In contrast to the foregoing, there is nothing to suggest that Rice himself could have been arrested merely for being drunk in the car driven by Irby, or how long he would have been held by the police even if he could have been arrested. *Compare County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1670 (1991) (noting, even within first 48 hours, booking must be prompt and delays may be tolerated only for valid administrative reasons). Had Gardner called a cab for Rice, but the cab driver turned out to be drunk and killed Rice, no doubt Trooper Gardner could be sued under the identical theory accepted by the Court below. This is plainly not the law. *See Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels v. Williams*, 474 U.S. 327 (1986); *Martinez v. California*, 444 U.S. 377 (1980). If the knowing-if-not-reckless conduct at issue in *DeShaney* could not be the basis for a substantive due process claim, then surely the arguably negligent conduct asserted to have been alleged here must require dismissal of Respondents' claims. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (Rule 12 motion must be granted even if complaint raises a claim that is "close but unavailing").

4. Even if, however, the conduct at issue here could be characterized as the same sort of recklessness at issue

in the *DeShaney* case, this case, at a minimum, is controlled by the Court's reasoning in *DeShaney*, and is not even arguably distinguishable from *DeShaney*. In this regard, the Seventh Circuit has simply evaded this Court's reasoning. In particular, the court of appeals in this case has read out of context this Court's statement that a due process claim could not lie in *DeShaney* because there the State "played no part" in the "creation" of the "dangers that Joshua faced." As in *DeShaney* itself, Trooper Gardner did not take Larry Rice out and get him drunk; he did not tell Rice that it was all right to drive; he certainly did not tell Rice to drive ninety miles an hour on a two-lane, undivided highway. And if Trooper Gardner did in some sense "tell" Rice to do what he did that caused the tragic accident in this case, Trooper Gardner's message was plainly no worse than the implied message given to Randy DeShaney by the Winnebago County Department of Social Services, *i.e.*, "do what you want."

5. As this Court reiterated in *DeShaney*, "we have said many times" that the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." 489 U.S. at 202. The decision of the Seventh Circuit, in addition to being in conflict with decisions of other federal circuits, *e.g.*, *Nobles v. Brown*, 985 F.2d 235 (6th Cir. 1992), and the decisions of the highest courts of several States, *e.g.*, *Williams v. Secretary of the Executive Office of Human Services*, 609 N.E.2d 447 (Mass. 1993), is completely at odds with this admonition, both generally, and in its particulars as explained in *DeShaney*. While "[j]udges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way" for the respondents to recover, *cf.*, 489

U.S. at 202, a decision of this Court "must be followed by the lower courts." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Because the court below, and, indeed, some other courts in similar circumstances, *e.g.*, *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2442 (1993), have failed to heed this precept, or have been confused by *DeShaney*, this Court should grant the writ and promptly reverse the Seventh Circuit's mandate with instructions to reinstate the Rule 12 judgment for Petitioner.

B. The Seventh Circuit's Displacement of Local Tort Law with the Doctrine of Substantive Due Process Raises an Issue of Nationwide Importance that Should Be Reviewed by this Court, Lest the States' Refusal to Subsidize the Recklessly Tortious Acts of Drunk Drivers and Other Private Actors Be Undermined in the Guise of § 1983 "Failure to Act" Due Process Claims.

1. In addition to breaching the Court's repeated disclaimers that the Due Process Clause is not a "font of tort law," the decision below fashions a federal remedy that, for many States, goes *beyond* what local law would provide; and, because the accident victims in this case, under both state tort and § 1983 precepts, can recover only once, the Seventh Circuit's decision, if permitted to stand, will result in displacement of state tort law in a way that *subsidizes* the sort of reckless behavior in which Larry Rice – if the complaint is correct – engaged during the early hours of September 11, 1988. As such, the decision below constitutes not only a federalization of liability that

might otherwise be imposed on Trooper Gardner as a matter of state law, it constitutes a federal *subsidy* to tortfeasors like Larry Rice who otherwise would be required under the tort law of their State to pay the full price of their actions.

2. As noted by Petitioner, the clear majority of States do not, as a matter of local law, impose a duty on their local police to restrain drunk drivers, because the duty to do so is one that is owed to "the public" generally and not to any individual. *See* J.L. Isham, Annotation, *Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer*, 48 A.L.R. 4th 320 § 2[a], at 325 (1986). Like the limitations built into the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), these court decisions recognize that to hold otherwise operates to require taxpayers to subsidize the private torts of those who directly cause tortious injury, in this case by driving recklessly, dangerously, and, allegedly, stone drunk. Here, of course, Trooper Gardner is sued in his individual capacity, and the Eleventh Amendment is not a bar. *Papasan v. Allain*, 478 U.S. 265, 278 n.11 (1986). But, if liability is foisted upon him, the public ultimately will pay in the form of higher taxes necessary to induce those subject to liability to work for state and local government. And, as the ruling below is a constitutional one, the decision below threatens the federal fisc in the same way.

3. Although the immunity conferred by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), would, we are confident, eliminate any threat of liability in this case, this Court should not permit the Seventh Circuit and the other courts that may choose to follow it to go down this

federal road in the first instance. Government officials should not be permitted to be sued for any remote role they may have had in "creating" a "danger" that leads to a private loss. Doing so ultimately will destroy the values of individual responsibility and the role of private insurance that properly allocate risk in state tort systems.

4. The amici States submit that, whatever may be the cure for tortious conduct as occurred in this case, it is not the result offered by the Seventh Circuit. Because the decision in this case will, if allowed to stand, have wide-ranging repercussions in supplanting the tort laws of the several States, and creating anomalous subsidies for private tortious conduct, this Court should grant the writ of certiorari, and reverse the judgment of the Seventh Circuit with instructions to restore the Rule 12 judgment that was entered for Petitioner in the District Court.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the Court should grant the writ of certiorari and reverse the judgment of the Seventh Circuit, with instructions to affirm the judgment of the District Court in favor of Trooper Gardner.

Dated: Honolulu, Hawaii, October 7, 1993.

Respectfully submitted,

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